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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

L. D. RAGAN, *Appellant*,

v.

CITY OF SEATTLE, *Appellee*,
WASHINGTON MUSIC MERCHANTS, INC.,
Intervening Appellee.

ON APPEAL FROM THE SUPREME COURT OF
THE STATE OF WASHINGTON

STATEMENT AS TO JURISDICTION

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METROPOLITAN PRESS AND WESTERN

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STATEMENT AS TO JURISDICTION

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Supreme Court of the State of Washington entered in this action on November 28, 1961, affirming the judgment of the Superior Court of the State of Washington for King County, and submits this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the Supreme Court of the State of Washington has not yet been officially reported; it appears unofficially at 158 Wash. Dec. 777, 364 P.(2d) 916 (1961).

and is annexed hereto as Appendix A. The Superior Court of the State of Washington for King County did not render an official or unofficial opinion.

JURISDICTION

This action was brought by appellant, L. D. Ragan, in the Superior Court of the State of Washington to obtain a declaratory judgment pursuant to Section 7.24.010 *et. seq.* of the Revised Code of Washington, that an ordinance of the City of Seattle was in violation of provisions of the Federal and State Constitutions. Injunctive relief was also sought. Summary judgment dismissing plaintiff's complaint was entered by the Superior Court, from which an appeal was taken to the Supreme Court of the State of Washington. The Supreme Court of the State affirmed the granting of a summary judgment on September 21, 1961. A petition for rehearing, timely filed on October 21, 1961, was denied and the judgment of the Supreme Court of the State became final on November 28, 1961 (Record, p. 38). The judgment is final as to both parties (RCW 2.04.220). Notice of appeal to this Court was filed in the Supreme Court of the State of Washington on February 26, 1962 (Record, p. 39), and the time for docketing the appeal was enlarged to extend to May 15, 1962, by order of the chief justice of the Supreme Court of the State of Washington, entered April 26, 1962.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1257(2). See *King Mfg. Co. v. Augusta*, 277 U.S. 100 (1928). The ordinance involved is Ordinance No. 87384 of the City of Seattle, set forth in Chapter 10.96 of the Charter and General Ordinance

of the City of Seattle. The pertinent text is set forth in Appendix B.

QUESTIONS PRESENTED

1. Is there any reasonable justification for the City of Seattle limiting the number of operators of music machines to one in every ten thousand persons in the city, when the following circumstances are present?

(a) More than the permitted number of licensees have already been licensed under prior law, but are permitted to retain their licenses, notwithstanding such limitation.

(b) Any person other than an existing operator is denied the right to own a music machine, from the day the ordinance became effective, for the sole reason that existing licensees more than exhaust available licenses.

(c) The actual operation of music machines is unrestricted, so long as one does business through a licensed operator, and pays him rental for the use of the machine.

2. Can any state of facts reasonably be conceived which would justify a city in setting a license fee of $250 for ownership of a music machine insofar as appellant is concerned, and $10 to others who are similarly situated?

STATEMENT

The appellant is a tavern owner in the City of Seattle and rents a duly licensed mechanical music machine, or juke box, as it is commonly known. The machine itself carries a "Mechanical Music Machine Sub-license" and the owner of the machine must be a licensed "Mechanical Music Machine Operator," but appellant is not required to obtain any license himself and is not licensed as an "operator."

Desiring to own his own machine, instead of renting one from another, appellant attempted in July, 1959, to apply to the City of Seattle for an "operator's" license so he could then buy his own machine and not pay rent to anyone. The city would not accept the application on the grounds that Ordinance No. 87384 permitted only one license for every 10,000 persons in the city and more licenses were outstanding already than were permitted.

Under the licensing scheme of the City of Seattle, whether a person owned one machine to be used in his own establishment, or one hundred, which he rented out to others, he must have an "operator's" license. Before enactment of the ordinance under attack here, there was no limit to the number of "operators" permitted and once one became an "operator" he could own any number of machines. Each machine then must have a "sub-license" attached to it. In this manner, the city knew who the operators were, how many machines each owned and where they were located. The law thus did not distinguish between a single machine owner, who desired to own a machine for use in his own establishment, and the true "operator," who was in the business of renting machines to others. If a person owned only one machine for his own purposes, he was an "operator" and must have been licensed as such. This gave him the right, if he so chose, to rent machines to others. The majority of "operators" were single machine owners, but the vast majority of machines in use were owned by a handful of true "operators" who were in the business of renting machines.

The ordinance involved here was enacted July 24, 1958. It amends a number of sections of the License Code of

the City of Seattle. Sections 1 through 5 of the amending ordinance have no bearing on the present dispute, since they relate to licensing gambling devices. Section 6 of the ordinance amends the former License Code provision by increasing the fee for the "operator's" license to $250, *unless* the licensee was a one-machine "operator" in prior years, in which case the fee continued to be $10.00. Thus, a newly licensed "operator" desiring to own only one machine would have to pay twenty-five times the fee required of a one-machine "operator" who had previously been licensed.

Section 6 also, in its final paragraph, limits the number of licenses to one for every ten thousand persons in the city, as shown by the most recent census. Since the census of 1950, which placed the population of the city at approximately 470,000, was the most recent census prior to the commencement of this action, only 47 "operator's" licenses were permitted. At that time, however, there were 86 outstanding. All of these were permitted to remain in effect, but it is undisputed that no more were permitted if the ordinance is valid.

Section 7 of the ordinance had a limit of 150 as the number of machines any one "operator" could own. None at the time had over 100 and the total number in use was less than 1,000. Conceivably over 10,000 could have been placed in use. The same section forbade any person renting a machine from changing "operators" without consent of the city council.

Faced with this situation, Ragan was denied a license to own and operate his own machine on the grounds that no licenses were available. He, thus, had to continue to rent a machine from one of the existing licensees. He

brought this action in the Superior Court of the State of Washington for King County to obtain an injunction against the enforcement of the ordinance and a declaratory judgment that it was in conflict with federal and state constitutional provisions (Record, pp. 1-6). Somewhat detailed reasons were alleged for its unconstitutionality under the Fourteenth Amendment as well as under the State Constitution (Record, pp. 2-5). The facts were obtained by requests for admission and interrogatories. The trial court granted summary judgment against Ragan and the matter was appealed on the merits of the constitutional issues to the State Supreme Court, which affirmed on the basis that the ordinance was a reasonable exercise of the police power. The State Supreme Court refused to consider the question respecting discriminatory license fees on the grounds that to do so would be premature.

THE QUESTIONS ARE SUBSTANTIAL

A. The Nature of the Case and of the Ruling of the Court Was Such as to Bring This Case Within the Jurisdictional Provision Relied On.

By its decision the Supreme Court of the State of Washington has upheld the validity of a city ordinance which was claimed to be repugnant to the Constitution of the United States in that it deprived the appellant of rights protected by the Fourteenth Amendment. The gist of the entire action was that, under the Fourteenth Amendment and under comparable state constitutional provisions, the City of Seattle had no right to enact an ordinance which unreasonably interfered with appellant's freedom to own a mechanical music machine. By sustaining the validity of the ordinance, the issue is squarely presented here whether the Fourteenth Amendment forbids a state

and its agencies to discriminate in this manner, or, to state the matter differently, whether the City of Seattle properly exercised its police power.

B. Reasons Why the Questions Presented Are So Substantial as to Require Plenary Consideration.

The issues involved in this appeal are similar to those raised by *Morey v. Doud*, 354 U.S. 457 (1957), and *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955). These issues are by no means limited to the music machine industry and those connected with it. At stake here, as in the *Doud* and *Lee Optical* cases, is the proper line of demarcation between reasonable economic regulations and "invidious discrimination." In general, the substantial nature of the federal questions here involved is demonstrated by defining first how the ordinance discriminates and secondly by assessing whether the discrimination has any reasonable relationship to the purpose of the act.

The ordinance itself could not have been more tailor-made to permit only those possessing licenses to continue to be licensed. In this sense it is much like *Morey v. Doud*. There, a named firm was excused from the licensing regulation altogether. Here, a privilege is denied to all but certain persons who are described, not by name, but by the ingenious method of limiting the number who can exercise the privilege to fewer than are already doing so. If anything, the discrimination in this case is more invidious, since, in *Morey v. Doud*, the statute held out some hope to those discriminated against that they could do business by complying with certain regulations. Here, the privilege of owning a music machine is flatly denied to all but the ascertained class.

Of course, the ordinance does admit the possibility that, at some unstated future time, the number of licenses available under the formula established might permit the appellant to obtain a license, but if the license was available to him, he would be charged a license fee of $250.00, compared to the $10.00 required of a single-machine owner for the renewal of a pre-1958 license. The undisputed effect of the ordinance is thus to place appellant betwixt one group of single-machine owners holding pre-1958 licenses, for which they pay $10.00 annually, and another closed class of licensees to which he cannot gain entrance because all the licenses are taken. What is worse, even if appellant could gain entrance to the latter class at some future time, he would be forced to pay twenty-five times the license fee some neighbor of his up the street is paying for the same privilege of owning his own machine. As a consequence, the ordinance here does more than simply forestall competition among the operators—it actually forces an establishment owner such as appellant to do business with a member of the closed class if he is to have a music machine on his premises at all. And, to cap the matter off, the ordinance then provides that, once the appellant has rented a machine from a member of the conveniently closed class, he cannot thereafter change "operators" without applying for and receiving city council approval.

No one seriously disputes that the ordinance discriminates against the appellant—all he wants to do is buy and own his own music machine and pay the same license fee as others in his position do. The city will not let him do this. The city does not care if he has a machine on

his premises. All it says is that he cannot own it, or if, in the future he could possibly qualify as an owner, he would have to pay twenty-five times the fee others in his position pay.

The real basis for the city's argument is that such discrimination is justified. Appellant submits that the scheme of the ordinance is such that, whether it is considered as a whole or each provision is considered separately, the discrimination is invidious; that a closed class is created without any accompanying policing or economic advantage; that the class created bears no relationship to any purpose legitimately within the ambit of the police power, and that the federal issues are, therefore, substantial within the meaning of this Court's rules.

If it is true, as the city argues, that there is unlawful competition among "operators" for locations, why should appellant be forced by ordinance to do business with *any* "operator" by being deprived of the right to own his own machine?

If it is true that the purpose of the law is to prohibit "operators" from having financial interests in locations, why does the law force the location owner to do business with an "operator"?

If it is true that the purpose of the law is to prevent monopoly among operators, why does the law forbid the location owner from owning his own machine?

If it is true that the purpose of the law is to better police nuisances and obscenity, why should the location owner where the violation occurs be forbidden from owning his own machine?

If it is true that the purpose of the law is to eliminate music machines in an orderly way, why are ten times as many permitted by the law as are in use?

If it is true that the above are the purposes of the law, then why are the pre-1958 single-machine operators exempted?

Is it not true that, considered rationally, the only reasonably conceivable purpose of this law is to limit licenses not for any public purpose at all, but solely in the interest of the privileged few already in the business?

The ordinance on its face recites no purpose. The *possible* purposes conceived by the city's attorneys and the attorney for the closed class benefited by the ordinance, and suggested by the opinion of the State Supreme Court, have only indirect and inconsequential relationship to the net result of the ordinance—the discrimination against appellant. Most of the *possible* purposes suggested in respect of some of the provisions are even at odds with the undisputed meaning of the language used. The ordinance is said to be anti-monopoly, yet in truth a monopoly is granted. It is said to be the first step toward eventual prohibition, yet ten times the number of machines in use are authorized and the people who should be most concerned with possible prohibition are here vigorously defending the validity of the law. It is said to be justified by criminal competition among operators for locations, yet a location owner is forced to do business with an "operator" to get a machine. Surely, this Alice in Wonderland logic must be some indication that here we have a discrimination of an "unusual character." *Morey v. Doud*, 354 U.S. at 464.

Appellant submits that the question of "invidious discrimination" is here a substantial one and that the doctrines reviewed in *Morey v. Doud* and *Williamson v. Lee Optical Co.* merit further exposition and refinement in light of the facts of the present controversy. The issues present in this case afford the Court an opportunity to resolve any areas of doubt between the two decisions cited and to elucidate with precision what constitutes a reasonable basis for discrimination, under circumstances that have not been previously presented to this Court.

CONCLUSION

For the reasons stated, appellant submits that this Court should note probable jurisdiction.

Respectfully submitted,

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APPENDIX A

DECISION OF THE WASHINGTON STATE SUPREME COURT

[No. 35761. *En Banc.* September 21, 1961]

L. D. RAGAN, *Appellant*, v. THE CITY OF SEATTLE *et al.*, *Respondents.*

HILL, J.—We are here concerned with the constitutionality[1] of an ordinance regulating the licensing of juke-box operators.

The attack on the ordinance is made under the declaratory judgment act by L. D. Ragan, who owns a tavern in the City of Seattle and has a duly licensed juke box on his premises which he leases from a licensed-Mechanical-Music-Machine operator. He desires to purchase and operate his own juke box in his tavern, but he cannot own a machine since he has no operator's license.

It is the city's refusal to issue the necessary license that irks him and results in this litigation, seeking to restrain the city's enforcement of its licensing ordinance (No. 87384) and to compel the issuance of a license to him. The city alleges, in its answer, that he is not eligible to secure such a license. Both parties moved for a summary judg-

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[1]The appellant begins his brief with the statement, "This is an action seeking a declaratory judgment that an Ordinance of the City of Seattle is unconstitutional under both the federal and State of Washington constitutions."

For the gist of the constitutional argument see note 2. Nowhere are we advised by article and section of the provisions of the constitutions relied on, except on page 24 of the brief where there is a reference to the Fourteenth Amendment to the Constitution of the United States and to a provision in the Constitution of the State of Washington identifiable as Art I, § 12.

ment; the city's motion was granted, and the action was dismissed. Mr. Ragan has appealed.

The underlying thesis of the appellant's argument is that the power to reasonably regulate is conceded, but that the issue is the reasonableness of the ordinance as a regulatory measure. If it is not reasonable, it is not constitutional.[2]

Appellant points out the distinction between a business which can be prohibited and one which can only be regulated in these quotations from his brief.

> ". . . if the business is judged to be one not subject to prohibition entirely, then limitation of it such as is attempted here is spurious and must be eliminated. To ask the question is perhaps to answer it—What is there so inherently corrupting and fraught with public peril about juke boxes that would justify a city in banning them completely? Juke boxes are, after all, not akin to saloons, boxing matches or cockfights, which

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[2]The gist of the constitutional argument is found in quotations from McQuillin on Municipal Corporations (3d ed.) on pages 8 and 9 of appellant's brief:

" 'There is, of course, a definite relationship between reasonableness and constitutionality of an ordinance, and its unreasonableness may be considered as a test of its unconstitutionality.' McQuillin, *Municipal Corporations*, Vol. 5, §18.01, p. 182.

" 'Stated in broad outline in its simplest form, the problem of the constitutionality of ordinances in respect of common or fundamental rights is to reconcile the liberty of the individual with the public welfare. This is merely to state in one form the fundamental problem of constitutional protection of persons against municipal corporations. It is also, of course, merely one phase of the broader problem of constitutional protection of citizens against state action. On any level, public authority seeks to accord to the individual the widest liberty in personal action and in the use of his property, consistent with the interests of the public. Regulations restraining a common right are allowable on the grounds of public necessity only, not on the basis of mere desire, expediency or convenience; hence, the necessity must distinctly appear, and, moreover, the ordinance or regulation must be reasonable, uniform and enacted in good faith in the public interest.' McQuillin, *Municipal Corporations*, Vol. 5, § 19.10, p. 487."

in the interest of public morality may be legitimately prohibited. Essentially, a juke box is a mechanical contrivance for dispensing a commodity, just as a gum machine dispenses a commodity. And certainly, no one will maintain that music, in itself, however unesthetic, so corrupts as to justify its elimination. It will be granted that the municipality has a legitimate interest in regulating the volume of the music to prevent the occurrence of a nuisance and to forbid the playing of obscene selections, but this is the basis on which regulation as distinguished from prohibition is justified. . . .

"Prohibition being unsupportable, it follows that arbitrary limitation of the extent of juke boxes must likewise fail. Ownership of juke boxes, subject to reasonable regulation as to volume and decency, must be open to all."

[1] Unfortunately, for appellant's position, we seem to have gone down what he seems to regard as the road to serfdom much further than he recognizes, and the "unsupportable" prohibition is accepted and supported by respectable judicial authority. In *Raymond v. Village of River Forest* (1953), 350 Ill. App. 80, 111 N.E.(2d) 848, the court held that an ordinance prohibiting the use of any coin-operated juke or music boxes was a valid exercise of the municipal police power. Much earlier it had been held that an ordinance prohibiting the playing of musical instruments, including juke boxes or other mechanical musical devices, in places where intoxicating liquor was offered for sale might be prohibited. *Zinn v. City of Steelville* (1943), 351 Mo. 413, 173 S.W.(2d) 398. See also *City of DeRidder v. Mangano* (1936), 186 La. 129, 171 So. 826.

Attention is also directed to the arguments of the intervenor, Washington Music Merchants, Inc. It says in its brief:

> "The ownership and operation of juke boxes is such an activity [*i.e.*, one that has a potentially detrimental influence on the public welfare]. It is a matter of common knowledge, of which the court may properly take judicial notice, that music, whether it is Ravel's Bolero, Erotica, rock-and-roll, Sinatra, or Presley, may have a stimulating, exciting, frenetic effect on its listeners which tends to break down normal inhibitions and to produce disturbances, disorders, and conduct contrary to the accepted mores of the community.
>
> "The point is underlined when the music is played in places of public resort where intoxicants are served, as is the case with the appellant here."

Disregarding the implication of judicial notice, this is a most refreshing recognition, from those most interested in the leasing of juke boxes, of the need for strict regulation wherever located and perhaps their prohibition where intoxicants are served.

An affidavit by the then chief of the detective division of the Seattle Police Department, submitted by the city, indicates that coercive tactics, involving threats of physical violence and interference with business, have been used by certain of the parties engaged in the leasing of machines. These are certainly conditions to be considered in determining the extent and the character of requisite regulations.

Consequently, we approach the consideration of the reasonableness of ordinance No. 87384 with the assumption that juke boxes may not only be regulated but prohibited in the public interest.

[2, 3] It is to be noted that the scope of our inquiry is limited to: Do the regulations have a reasonable and

substantial relation to the accomplishment of some purpose fairly within the legitimate range or scope of the police power and not violate any direct or positive mandate of the constitution? *Nebbia v. New York* (1933), 291 U. S. 502, 78 L.Ed 940, 54 S.Ct. 505, 89 A.L.R. 1469; *State v. Canyon Lbr. Corp.* (1955), 46 Wn.(2d) 701, 284 P.(2d) 316; *State v. Dexter* (1949), 32 Wn.(2d) 551, 202 P.(2d) 906; 13 A.L.R.(2d) 1081; *Campbell v. State* (1942), 12 Wn.(2d) 459, 122 P.(2d) 458; *Shea v. Olson* (1936), 185 Wash. 143, 53 P.(2d) 615, 111 A.L.R. 998; *Seattle v. Proctor* (1935), 183 Wash. 293, 48 P.(2d) 238; 13 A.L.R.(2d) 1081. Is the question presented to the court by someone who has been, or can be, injuriously affected by the regulation? *Galvin v. State Tax Comm.* (1960), 56 Wn.(2d) 738, 355 P.(2d) 362; *Port of Tacoma v. Taxpayers of the Port of Tacoma* (1959), 53 Wn.(2d) 734, 336 P.(2d) 872; *State v. Canyon Lbr. Corp., supra; State ex rel. Campbell v. Case* (1935), 182 Wash. 334, 47 P.(2d) 24; *Ajax v. Gregory* (1934), 177 Wash. 465, 32 P.(2d) 560.

A specific illustration of the latter issue is Mr. Ragan's complaint that under ordinance No. 87384 he would have to pay two hundred and fifty dollars annually for an operator's license to own the machine used in his tavern, but others in identical positions (if they had been licensed operators in 1957 and succeeding years) would only have to pay ten dollars[1] annually for such a license. There would seem to be possible merit to this complaint; but unless he is entitled to procure such a license, the amount of the fee

[1]This is regarded as a violation of Art I, § 12, of the state constitution. "No law shall be passed granting to any citizen, class of citizens, or corporation, other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations."

is of academic interest only, and he has no cause for complaint. Hence, unless Mr. Ragan is entitled to have a license, we will not consider whether there is any justification for such a difference in license fees.

The particular provisions of the ordinance, here under attack, will be stated in narrative form, together with Mr. Ragan's objections thereto and the city's answer.

By the terms of the ordinance whether a person owns one juke box used in his own restaurant or tavern, or whether he owns a hundred and fifty[4] which he rents out to others, he need have only one Mechanical-Music-Machine operator's license. Each machine must have a Mechanical-Music-Machine sublicense attached to it. In this manner the city knows who the operators are, how many machines each operator owns[5], and where they are located.

The number of licenses is limited by a provision that only one operator's license shall be issued for ten thousand residents of the city of Seattle, as shown by the last preceding state or Federal census[6]. There were, at the time the

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[4]Before ordinance No. 87384, there was no limit to the number of machines one could own if he possessed an operator's license. The limit now is one hundred and fifty; however, no licensee had over a hundred at the time this case was decided.

[5]Sixty-nine license holders in October, 1959, owned nine hundred and thirty-nine machines; forty-one had but one machine each; ten had from forty-five to ninety-seven machines; the total being six hundred and fifty-two; the other eighteen license holders had from two to thirty-five machines; the total being two hundred and forty-six. By June, 1960, the number of single-machine owners had dropped to thirty-four; the multiple-machine operators were twenty-seven in number.

[6]By the 1950 Federal census (the most recent at the time the action was commenced and judgment entered), Seattle's population was 467,591. It was conceded that a state census, as of April 1, 1959, showed a population in Seattle of approximately 580,000.

ordinance was passed in 1956 [1958], eighty-six licenses outstanding (reduced by October, 1959, to sixty-nine), so that if the 1960[7] census figures are used, there would be no new licenses available unless fourteen of the licenses outstanding in October, 1959, were not renewed.

It is urged, by Mr. Ragan, that this freezes the licenses in the hands of those presently holding them, giving them a monopoly[8] in the matter of installation of juke boxes; but, at the same time, places no effective limitation on the number of juke boxes in the city as each operator could have up to one hundred and fifty machines, or a total of ten thousand three hundred and fifty machines, based on sixty-nine licenses; and that the privileged few, thus accorded a monopoly, may include the very ones whose coercive tactics were referred to in the affidavit of which mention has been made.

It is further urged that there are no standards by which to determine when a license shall be issued or to whom, and it is said:

> "... the conclusion becomes inescapable that the ordinance limits licenses, not in the interest of reasonable regulation of the industry, but in the interest of the privileged few already in the business."

Mr. Ragan further insists that the ordinance is not reasonable in that it makes no distinction between those who own and use their own machines in their own individual businesses and the "true" operators who are in the business of leasing machines to others.

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[7]1960 Federal census for Seattle: 557,087.

[8]Considered as a possible violation of Art XII, § 22, prohibiting monopolies.

The city's position is that the ordinance (No. 87384) amends certain sections of the basic license code (ordinance No. 48022), which ordinance, as amended, represents a proper exercise of the police power to achieve its purpose of preserving the peace by preventing racketeering and restricting coercion by competing professional operators and by requiring the approval of all location transfers of any juke box by the city council of Seattle; and, further, it prohibits the acquisition of any financial interest in juke-box locations by professional operators or manufacturers. It prevents monopoly by limiting any operator to one hundred and fifty machines, thus preventing there ever being a large juke-box organization in the city. At the same time, it avoids a divestment of any persons of existing property interests.

The city takes the further position that when ordinance No. 87384 was adopted the number of juke boxes (then over one thousand) made policing—solely by tracing and attempting to prosecute each violation—a fruitless and economically impossible method; and the legislative authority chose the more positive means of limiting the number of licensees; and that while, theoretically, that limitation of licensees did not necessarily decrease the number of juke boxes in use, in practice it has done so—the number in operation having decreased to nine hundred and thirty-nine in October, 1959.

We are impressed with Mr. Ragan's arguments: That since many other tavern operators are permitted to own their own juke boxes, he should be accorded a like opportunity; that such individual ownership is the best way to eliminate any racketeering or coercive methods between

the competing operators; and that, if the limitation of the number of juke boxes is the goal, the way to achieve it is to limit the number of juke boxes rather than the number of licensees.

[4] However, we are not the duly elected members of the Seattle City Council, charged with the responsibility of enacting the legislation whereby the city limits and controls the operation of juke boxes within its limits. Whether the terms of an ordinance are wise or unwise is a question addressed solely to the city council. *State ex rel. Hardy v. Superior Court* (1930), 155 Wash. 244, 250, 284 Pac. 93.

We cannot say that the legislation enacted by the city, regulating the operation of juke boxes, is unreasonable or oppressive, or that it does not have a substantial relation to the accomplishment of purposes fairly within the scope of the police power. As said by the Supreme Court of the United States in *Ohio ex rel. Clarke v. Deckebach* (1927), 274 U.S. 392, 71 L.Ed 1115, 47 S.Ct. 630:

> "It is enough for present purposes that the ordinance, in the light of facts admitted or generally assumed, does not preclude the possibility of a rational basis for the legislative judgment and that we have no such knowledge of local conditions as would enable us to say that it is clearly wrong."

Since Mr. Ragan is not presently eligible for a license, we will not, for reasons heretofore assigned, consider whether the license fee of two hundred and fifty dollars, which he would have to pay if he could so qualify, is unreasonably discriminatory.

The granting of a summary judgment of dismissal is affirmed.

ROSELLINI, OTT and HUNTER, JJ., concur.

FINLEY, C. J., and DONWORTH, J., concur in the result.

MALLERY, J. (Dissenting)—Arbitrary police power is the earmark of the police state, while the free world is characterized by the restraints upon sovereignty, which constitute the liberties of the people.

Thus, of the amendments comprising the Bill of Rights, the first two circumscribe the policies which may be made the subject of the police power, and the fourth, fifth, sixth, seventh, and eighth amendments impose restrictions upon the methods of its enforcement.

Of all of the powers of government, the police power is the most responsive to constitutional requirements, and the assumption that it is not is, to me, inexplicable.

We are here concerned with Art I, § 12, of the Washington state constitution, which provides, *inter alia*:

> "No law shall be passed granting to any citizen . . . privileges . . . which upon the same terms shall not equally belong to all citizens, . . ."

It is true that this relates to civil rather than criminal rights, but to law-abiding citizens it more nearly represents the spirit of America than any other. Equality before the law, and the land of opportunity are empty phrases if powerful influences can legally make fish of one and fowl of another, or if the right to live and make a living is subject to arbitrary licensing. There is no room for a caste of Hindu untouchables in America.

Licensing is a police-power technique having as its sole justification the protecting of the public in some opera-

tion which is a matter of public concern. Licensing legislation is more often than not sought by an organized group of the particular persons to be licensed. Such measures, therefore, must be scrutinized to insure that licenses are available to all eligible persons upon terms of equality to the end that public protection, rather than special privilege, shall be implemented thereby.

The arguments marshalled in support of the ordinance are specious. It is not denied that it arbitrarily grants licenses as a special privilege to some persons upon terms which it will not grant them to others. This is precisely what the constitutional prohibition was intended to prevent.

I dissent.

WEAVER, J. (dissenting)—I dissent upon the ground that the ordinance arbitrarily grants licenses as a special privilege to some persons upon terms that it does not grant them to others.

FOSTER, J., concurs with WEAVER, J.

APPENDIX B

ORDINANCE NO. 87384

An Ordinance relating to the operation and use of, and license fees for, certain amusement devices and mechanical music machines and amending Sections 300-A, 300-C, 300-E, 300-G, 328 and 328-A of, and adding two new sections designated 11-A and 328-D to, the License Code (Ordinance 48022) in connection therewith.

Be It Ordained by the City of Seattle as Follows:

Section 6. That Section 328 of the License Code (Ordinance 48022) be amended to read as follows:

"Section 328. It shall be unlawful to own and exhibit, lease, rent or place with others, for use, play or operation in any public place or establishment, any coin operated mechanical music machine without a valid and subsisting 'Mechanical Music Machine Operator's License,' the fee for which is hereby fixed at two hundred fifty dollars ($250.00) per annum; provided that the holder of a license for not more than one location issued for the year 1957, as provided in Section 327, may renew his license in such location at the fee provided for therein.

"No manufacturer of mechanical music machines, or representative of such manufacturer, and no holder of a mechanical music machine operator's or wholesale vendor's license who leases or rents to or places with others any mechanical music machine for use, play or operation in any public place, or any person financially interested in such licensed business, whether resident or non-resident, shall have any financial interest, direct or indirect, in the business of any licensed location; nor shall any such manufacturer, or manufacturer's representative, or holder of an operator's or wholesale vendor's license own any of the property upon which such licensed location conducts its business; nor shall any licensed location, under any

arrangement whatsoever, conduct its business upon property in which any such manufacturer, or manufacturer's representative, or holder of an operator's or wholesale vendor's license has any interest; nor shall any such manufacturer, or manufacturer's representative, or holder of an operator's or wholesale vendor's license advance money or moneys worth, or make any gift, to any licensed location under any arrangement whatsoever; or in such connection shall any licensed location receive, under any arrangement whatsoever, any advance of money, moneys worth or gift; provided, that any licensee hereunder may operate mechanical music machines in locations on property or business owned by him during the year 1957 until he surrenders or fails to renew such license.

"Financial interest, direct or indirect, as used in this section, includes any interest whether by stock ownership, mortgage, lien, or through interlocking directors or otherwise.

"Not more than one mechanical music machine operator's license shall be issued for each ten thousand (10,000) of the total population of the city, as shown by the last preceding state or federal census."

Section 7. That Section 328-A of the License Code (Ordinance 48022) be amended to read as follows:

"Section 328-A. It shall be unlawful for anyone to own and exhibit, lease, rent or place with others, for use, play or operation in any public place or establishment, any coin operated mechanical music machine without a valid and subsisting 'Mechanical Music Machine Sub-License' for each such machine, the fee for which is hereby fixed at ten dollars ($10.00) per annum for each such license issued after the effective date hereof, which 'Mechanical Music Machine Sub-License' shall be in the form of a metal or plastic tag issued by the City Comptroller and shall be valid only when attached to such music machine in a conspicuous place near an indelible printed, stamped or impressed statement containing the name

and address of the owner and vendor or distributor of such machine.

"Not more than one hundred fifty (150) mechanical music machine sub-licenses shall be issued to any one operator; and no sub-license shall be transferred during the license year from the location to which said sub-license was issued without the consent by resolution of the City Council; provided, that such limitations shall not apply to prevent renewal of sub-licenses issued for the year 1957 until the licensee surrenders or fails to renew the same."

Passed by the City Council the 14th day of July, 1958, and signed by me in open session in authentication of its passage this 14th day of July, 1958.

PAUL J. ALEXANDER,
President pro tem. of the
City Council.

Approved by me this 24th day of July, 1958.

GORDON S. CLINTON,
Mayor

JOHN F. DAVIS, CLERK

In the
Supreme Court of the United States

OCTOBER TERM 1961

No. 372 / 31

L. D. RAGAN, *Appellant*,
vs.
CITY OF SEATTLE, *Appellee*,
WASHINGTON MUSIC MERCHANTS, INC.
Intervening Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION TO DISMISS

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THE ARGUS PRESS, SEATTLE, WASHINGTON

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In the

Supreme Court of the United States

OCTOBER TERM 1961

L. D. RAGAN, *Appellant,*

vs.

CITY OF SEATTLE, *Appellee,*

WASHINGTON MUSIC MERCHANTS, INC., *Intervening Appellee.*

No. .....

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION TO DISMISS

Motion of Appellee City of Seattle to Dismiss

Appellee, The City of Seattle, pursuant to Rule 16 of the Revised Rules of this Court, moves to dismiss the appeal in the above entitled case on the ground that the appeal does not present a substantial federal question.

STATEMENT OF CASE

During 1957 and 1958 the legislative authority of The City of Seattle was advised of criminal activity in the form of threats of physical violence and interference with business establishments in Seattle by persons interested in the ownership and operation of coin-operated mechanical music machines also referred to herein as "juke boxes" (R. 21). Acting on said advice Ordinance 87384 was enacted on July 24, 1958, amending certain sections of the general licensing ordinance of

Seattle (Ordinance 48022) to meet the problem. Said Amending Ordinance established the following limitations upon "juke box" operation in the city:

1. Forbade the transfer of any such machine location license without approval of the City Council by Resolution.

2. Prohibited the acquisition of any financial interest in the premises where a "juke box" was located by any manufacturer, holder of a mechanical music machine operator's license, or by the holder of a wholesale vendor's license.

3. Set a maximum size upon the operation of any one operator at 150 location licenses, which number constituted a 33% operating margin over the then largest single operation of 111 machines (R. 22).

4. Restricted for the time new entrants into this activity by permitting only one licensee per ten thousand population.

Appellant is a tavern owner desirous of owning the coin-operated mechanical music machine which he chooses to maintain in his tavern. Under Ordinance 87384 appellant is precluded from acquiring such an ownership interest as is the case with all individuals in the City desirous of owning such machines, with the exception of approximately 40 individuals who were "juke box" licensees at the time that amending Ordinance 87384 was passed. Appellant sought declaratory relief in the Superior Court, then appealed to the Supreme Court of the State of Washington which court in its decision reported at 58 Wn.(2d) 779, 364 P.(2d) 916 determined that appellant could be prospectively

denied the opportunity to own a "juke box" commercially, as an incident to a legislative limitation upon the number of "juke boxes," "juke box" operators and their operations, if such limitation is reasonably necessary to prevent coercive tactics involving threats of physical violence and interference with other lawful businesses by competing "juke box" operators (in addition to the ordinary and widely recognized obnoxious aspects of "juke boxes," *e.g.* noise-nuisance, an accessory for reproduction of obscene recordings, etc.), all in the interest of protecting the public peace and safety.

I. The Ordinance Does Not Violate the Due Process or Equal Protection Clauses of the Federal Constitution.

Confronted with the conditions stated the means adopted by the legislative authority of The City of Seattle, and in due course upheld by the Superior Court and the Supreme Court of the State of Washington, were reasonably related and directed to the object of preventing expansion of the "juke box" business or increase in number of "juke boxes," restricting coercion by competing professional operators, meanwhile avoiding divestment of any persons with property or livelihood dependent upon the business of such property or livelihood.

The ordinance deters efforts to compel lessees by improper methods to transfer their patronage by requiring approval of location transfers by the City Council. The ordinance in question sets a maximum size upon the operations of any single operator at 150 machines, which number constituted a 33% operating margin

upon the largest operator at the time of the enactment (R. 22). By thwarting new starts in the business and by limiting the eventual size of any one operation, in the presence of knowledge that nearly all owner-operators (single machine owners) would never be otherwise, the legislative authority calculated the gradual decline of "juke box" operations.

The object of the challenged ordinance is a proper subject for exercise of the police power of The City of Seattle, and the object being proper, the means employed bears a reasonable relation to its attainment, and is no failure of legislative due process.

If there is a reasonable basis for classification it is not ground for objection that during the progress of limitation one class continues while the other is denied. *Goesart v. Cleary* (1948) 335 U.S. 464, 93 L.ed. 163, 69 S.Ct. 198.

Appellee contends that the City's legislative authority exercising its police power by ordinance pursuant to its charter adopted under the provisions of Art. XI, Sections 10 and 11 of the Washington constitution, may prohibit "juke boxes" outright on the basis that such devices present a police problem arising out of the purveyance of obscene recordings, frequent nuisances and lately certain aspects of criminal conduct (R. 21). Appellee submits the following judicial authority in support of prohibition of "juke boxes": *Raymond v. Village of River Forest* (1953) 350 Ill. App. 80, 111 N.E.(2d) 848; *Zinn v. City of Steelville* (1943) 351 Mo. 413, 173 S.W.(2d) 398. If the city may do so, it may, *a fortiori*, restrict the number and man-

ner of their operation so long as there is a reasonable basis for the regulation and any resulting distinction between classes created thereby.

With reference to appellant's contention that the limitation of 150 "juke boxes" per licensee is no limitation at all (since 150 times the existing number of licenses would have amounted to approximately 10,000 machines, whereas only 1,009 were extant in the city at the date of enactment) and hence only a mask for "invidious discrimination" it is significant appellee submits that between the date of enactment of Ordinance 87384 and the decision below the largest single operation in Seattle had declined from 111 to 84, the number of both single and professional operators has been reduced and the total number of "juke boxes" in Seattle had declined from 1,009 at time of the enactment of Ordinance 87384 to 939 at the time of the commencement of this action (R. 22). The controversy seems at root to be over appellant's refusal to concede to the legislative authority of Seattle the power to legislate on the basis of its knowledge that existing single machine owner-operators, nearly all of them small tavern or restaurant proprietors, would not suddenly expand to 150 machine licensees, which is the fact.

The facts surrounding the enactment of Ordiance 87384 are not disputed, and such facts so clearly meet the requirement of *Ohio ex rel. Clarke v. Deckebach*, 274 U.S. 392, 71 L.ed. 1115, 37 S.Ct. 630, that further review of the general legal principles involved in this appeal can serve no constructive purpose.

The Federal Questions Presented Are Not Substantial

With reference to the questions appellant presents, all have been answered by the decisions of the court in the following cases:

With reference to appellant's Question No. 1 (a) and (b), by *Ohio ex rel. Clarke v. Deckebach* (1927) 274 U.S. 392, 71 L.ed. 1115, 37 S.Ct. 630; *Murphy v. California* (1911) 225 U.S. 623, 56 L.ed. 1229, 32 S.Ct. 697.

With reference to appellant's subparagraph (c) by *Crescent Cotton Oil Co. v. Mississippi* (1921) 257 U.S. 129, 66 L.ed. 166, 42 S.Ct. 42. In this appeal, as in the case above cited, the court below credited the legislative authority with cognizance of a distinction which in fact existed, in this instance between the single machine owner-operator and the multiple machine "professional" operator, as such distinction relates to the validity of the numerical limitation (150 machines per licensee) upon "juke boxes" although such distinction is not referenced by the language of the ordinance.

With reference to appellant's question No. 2, by *New York ex rel. Lieberman v. Van De-Carr* (1905) 199 U.S. 552, 50 L.ed. 305, 26 S.Ct. 144, and by the express abstention from determination of this question by the Supreme Court of the State of Washington.

CONCLUSION

Appellant raises neither new nor substantial federal questions, as contemplated by Title 28, United States Code, Section 1257 (2), the basic legal principles having been well established by *Murphy v. California* (1911) 225 U.S. 623, 56 L.ed. 1229, 32 S.Ct. 697, and

Ohio ex rel. Clarke v. Deckebach (1927) 274 U.S. 392, 71 L.ed. 1115, 37 S.Ct. 697.

Appellee therefore moves the Court to dismiss this appeal.

Respectfully submitted,

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No. 121

In the Supreme Court of the United States

OCTOBER TERM, 1961

L. D. RAGAN, *Appellant*,

v.

CITY OF SEATTLE, *Appellee*,
WASHINGTON MUSIC MERCHANTS, INC.,
Intervening Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION TO DISMISS APPEAL

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No.....

In the Supreme Court of the United States

OCTOBER TERM, 1961

L. D. RAGAN, *Appellant*,

v.

CITY OF SEATTLE, *Appellee*,
WASHINGTON MUSIC MERCHANTS, INC.,
Intervening Appellee.

ON APPEAL FROM THE SUPREME COURT OF
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Revised Rules of this Court, Rule 16 1

No.....

In the Supreme Court of the United States

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v.

CITY OF SEATTLE, *Appellee*,
WASHINGTON MUSIC MERCHANTS, INC.,
Intervening Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION TO DISMISS APPEAL

The Intervening Appellee, Washington Music Merchants, Inc., pursuant to Rule 16 of Revised Rules of this Court, moves to dismiss the appeal herein on the following ground:

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED BY THE APPEAL

1. Constitutionality of the Fee Required From Otherwise Eligible Applicants for a License to Own and Operate a Mechanical Music Machine in the City of Seattle.

The Supreme Court of the State of Washington did not pass on this question on the adequate non-

federal ground that the appellant lacks standing to raise it because he is not within the class affected by the fee requirement. *State ex rel. Campbell v. Case,* 182 Wash. 334, 47 P. (2d) 24 (1935).

Therefore, this question is not before the Court.

2. Constitutionality of the Limitation Imposed by the Ordinance on the Number of Persons Who May Own and Operate Mechanical Music Machines in the City of Seattle.

It has long been settled that a legislative enactment does not violate the Fourteenth Amendment if the facts admitted or generally assumed do "not preclude the possibility of a rational basis for the legislative judgment." *Ohio ex rel. Clarke v. Deckebach,* 274 U.S. 392, 71 L. ed. 1115, 37 S.Ct. 630 (1927).

An ordinance licensing a trade or occupation is presumed to be reasonable and to have a substantial relationship to the accomplishment of purposes within the scope of the police power. The burden of overturning this presumption is on the appellant, and he does not meet this burden by speculating about the legislative motives which occasioned enactment of the ordinance.

It cannot be said that there is no rational basis for a legislative judgment that mechanical music machines have a potentially deleterious effect on public health and morals and that the number of owners and operators of such machines should be limited to one for every 10,000 persons.

Nor can it be said that it is unreasonable for a legislative body to decide that, instead of expropriating existing investments by immediate revocation of sufficient licenses to bring the total down to the

level prescribed in the ordinance, it will permit normal attrition to accomplish the regulatory goal.

The question is: Can any state of facts that would sustain such a choice be reasonably conceived? *Tigner v. Texas*, 310 U.S. 141, 84 L. ed. 1124, 60 S.Ct. 679 (1940); a legislative body may reasonably suppose that a person who has been able to get and retain a license under prior regulations is more apt to be a responsible, reliable, and law-abiding operator than a person who has no performance record. Futhermore, a legislative body may reasonably believe, when establishing a new regulatory program, that it should give an advantage to persons who have an existing, going interest in the business being regulated as against persons whose interest is only prospective.

The question as to the constitutionality of the limitation on the number of persons who may own and operate mechanical music machines in the City of Seattle is not sufficiently substantial to support an appeal. *Zucht v. King*, 260 U.S. 174, 67 L. ed. 194, 43 S.Ct. 24 (1922).

CONCLUSION

For the reasons set forth above, the appeal should be dismissed.

Respectfully submitted,

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